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Investigation  
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September 8, 2014

**MEMORANDUM TO:** Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

**FROM:** Gary Taverman   
Associate Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Determination of  
the Antidumping Duty Investigation of Chlorinated Isocyanurates  
from Japan

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**I. Summary**

We analyzed the comments of the interested parties in the antidumping duty ("AD") investigation of chlorinated isocyanurates ("chlorinated isos") from Japan. As a result of this analysis and based on our findings at verification<sup>1</sup>, we made certain changes to the margin calculations for the mandatory respondents, Nankai Chemical Co., Ltd. ("Nankai") and Shikoku Chemicals Corporation ("Shikoku"), collectively "Respondents". We recommend that you approve the positions we developed in the "Discussion of the Issues" section of this memorandum.

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<sup>1</sup> See Memorandum to the File, through Neal Halper, Director, Office of Accounting, from Ernest Z. Gziryan and Peter Scholl, Accountants, Subject: Verification of the Cost of Production and Constructed Value Data Submitted by Shikoku Chemicals Corporation in the Antidumping Duty Investigation of Chlorinated Isocyanurates (Chlorinated Isos) from Japan, (June 20, 2014) ("Shikoku Cost Verification Report"); Memorandum to the File, through Scot T. Fullerton, Program Manager, Office V, from Julia Hancock, Jerry Huang, and Justin Becker, Analysts, Subject: Verification of Home Market Sales of Shikoku Chemicals Corporation ("Shikoku"), (July 11, 2014) ("Shikoku Home Market Verification Report"); Memorandum to the File, through Scot T. Fullerton, Program Manager, Office V, from Julia Hancock and Jerry Huang, Analysts, Subject: Verification of Shikoku International Corporation in the Antidumping Duty Investigation of Chlorinated Isocyanurates from Japan, (July 11, 2014) ("SIC Verification Report").



## **Background**

On April 24, 2014, the Department published in the *Federal Register* the preliminary determination of sales at less than fair value (“LTFV”) in the AD investigation of chlorinated isos from Japan.<sup>2</sup> The following events occurred since we issued the *Preliminary Determination*.

Between April 16, 2014, and April 30, 2014, we issued supplemental sales and cost questionnaires to Nankai. On April 24, 2014, and May 6, 2014, Nankai submitted its supplemental questionnaire responses. On May 9, 2014, Nankai submitted a letter notifying the Department that it was withdrawing from further participation in this investigation.<sup>3</sup>

Between April 16, 2014, and May 14, 2014, we issued supplemental sales and cost questionnaires to Shikoku and its U.S. affiliate, Shikoku International Corporation (“SIC”). On April 17, 2014, May 8, 2014, and May 14, 2014, Shikoku submitted its supplemental questionnaire responses. On May 23, 2014, Shikoku requested that the Department hold a public hearing, and on July 18, 2014, Shikoku requested that a portion of the hearing be closed. On July 30, 2014, Shikoku withdrew its hearing request.

On May 8, 2014, the Department issued the agenda for the cost verification of Shikoku. On May 15, 2014, Clearon Corp. and Occidental Chemical Corporation (collectively “Petitioners”) submitted pre-verification comments on Shikoku. On May 16, 2014, the Department issued the agendas for the home market (“HM”) sales verification of Shikoku and the U.S. sales verification of SIC. The Department conducted the cost verification of Shikoku from May 19, 2014, through May 23, 2014. Additionally, the Department conducted the HM sales verification of Shikoku on May 26, 2014, through May 29, 2014, and the U.S. sales verification of SIC on June 9, 2014, through June 10, 2014.

On June 20, 2014, the Department issued the cost verification report for Shikoku. On June 30, 2014, the Department requested that Shikoku submit revised HM and U.S. sales databases based on the minor corrections submitted at verification. On July 9, 2014, Shikoku submitted revised HM and U.S. sales databases. On July 11, 2014, the Department issued the HM sales verification report for Shikoku and the U.S. sales verification report for SIC.

On July 11, 2014, the Department notified interested parties of the case brief and rebuttal brief schedule. On July 18, 2014, Petitioners and Shikoku submitted case briefs.<sup>4</sup> On July 23, 2014, Petitioners and Shikoku submitted rebuttal briefs.<sup>5</sup>

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<sup>2</sup> See *Chlorinated Isocyanurates from Japan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 22800 (April 24, 2014) (“*Preliminary Determination*”).

<sup>3</sup> See Letter to the Secretary of Commerce from Nankai Chemical Co., Ltd., Re: Chlorinated Isocyanurates from Japan: Withdrawal from Participation in the Investigation (May 9, 2014).

<sup>4</sup> See Letter to Secretary Pritzker from Shikoku Chemicals Corporation (“Shikoku”), Re: Chlorinated Isocyanurates from Japan: Case Brief and Request for Closed Hearing, (July 18, 2014) (“Shikoku’s Case Brief”); Antidumping Duty Investigation of Chlorinated Isocyanurates from Japan: Case Brief of Clearon Corp. and Occidental Chemical Corporation, (July 18, 2014) (“Petitioners’ Case Brief”).

## **Scope of the Investigation**

The products covered by this investigation are chlorinated isocyanurates. Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) trichloroisocyanuric acid ("TCCA") (Cl<sub>3</sub>(NCO)<sub>3</sub>), (2) sodium dichloroisocyanurate (dihydrate) (NaCl<sub>2</sub>(NCO)<sub>3</sub> X 2H<sub>2</sub>O), and (3) sodium dichloroisocyanurate (anhydrous) (NaCl<sub>2</sub>(NCO)<sub>3</sub>). Chlorinated isocyanurates are available in powder, granular and solid (e.g., tablet or stick) forms.

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.50.4000, 3808.94.5000, and 3808.99.9500 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dihydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isocyanurates and other compounds including an unfused triazine ring. The tariff classifications 3808.50.4000, 3808.94.5000 and 3808.99.9500 cover disinfectants that include chlorinated isocyanurates. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the investigation is dispositive.

## **II. Facts Available**

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended ("the Act"), provide that the Department shall apply "facts otherwise available" if, *inter alia*, necessary information is not on the record or an interested party: (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits, the Department may disregard all or part of the original and subsequent responses, subject to section 782(e) of the Act, as appropriate. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

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<sup>5</sup> See Antidumping Duty Investigation of Chlorinated Isocyanurates from Japan; Rebuttal Brief of Clearon Corp. and Occidental Chemical Corporation, (July 23, 2014) ("Petitioners' Rebuttal Brief"); Letter to Secretary Pritzker from Shikoku Chemicals Corporation, Re: Chlorinated Isocyanurates from Japan: Rebuttal Brief, (July 23, 2014).

On May 9, 2014, Nankai informed the Department that it would not continue to participate in the instant investigation. Pursuant to sections 776(a)(2)(C) and (D) of the Act, facts available is warranted in calculating the AD margin for Nankai. We determined that Nankai significantly impeded the proceeding by ceasing to participate in the instant investigation, thus preventing the Department from gathering the necessary facts on cost and sales issues. Additionally, by ceasing its participation, Nankai prevented the Department from conducting verification of the information the company submitted. For these reasons, we find that the use of facts available, pursuant to sections 776(a)(2)(C) and (D) of the Act, is appropriate in determining the applicable AD margin for Nankai.

Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may employ an adverse inference if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information.<sup>6</sup> In the instant case, we determined that applying section 776(b) of the Act is warranted for Nankai. This determination is based on the fact that Nankai's withdrawal from the investigation prevented the Department from fully investigating Nankai's cost and sales information and verifying the information submitted to the Department, thus constituting a failure of Nankai to cooperate to the best of its ability.

Section 776(b) of the Act also authorizes the Department to use, as adverse facts available ("AFA"), information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. In selecting a rate for AFA, the Department selects one that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."<sup>7</sup> It is the Department's practice to select, as AFA, the higher of the (a) highest margin alleged in the petition, or (b) the highest calculated rate for any respondent in the investigation.<sup>8</sup> Accordingly, to ensure that the non-cooperative party, Nankai, does not benefit from its lack of participation, and to select a sufficiently adverse rate to induce cooperation in the future, for the final determination, we selected the higher of either (a) the highest margin alleged in the petition that we could corroborate or (b) the highest weighted-average calculated rate for any respondent in the investigation, subject to the corroboration requirement for secondary information.<sup>9</sup> The calculated weighted-average margin for the other mandatory respondent, Shikoku, in this final determination is less than the highest petition margin which can be corroborated, *i.e.*, 151.8

<sup>6</sup> See *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the Russian Federation*, 65 FR 5510, 5518 (February 4, 2000); *Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 62 FR 53808, 53819-20 (October 16, 1997); *Crawfish Processors Alliance v. United States*, 343 F. Supp.2d 1242 (CIT 2004) (approving use of AFA when respondent refused to participate in verification); see also *Statement of Administrative Action*, accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Rep. No. 103-316, 870 (1994) ("SAA").

<sup>7</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

<sup>8</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Orange Juice from Brazil*, 71 FR 2183, 2185 (January 13, 2006).

<sup>9</sup> See *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 31093 (May 30, 2014) and accompanying Issues and Decision Memorandum at Comment 2.

percent (see below).<sup>10</sup> Therefore, consistent with its practice, the Department is assigning the highest corroborated margin alleged in the petition, which is 151.8 percent, as facts available for Nankai.

#### Corroboration of Adverse Facts Available

The Department is relying on secondary information in using facts otherwise available. Section 776(c) of the Act provides that, when the Department relies on secondary information in using the facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA provides that the term “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.<sup>11</sup> Thus, to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The SAA also states that independent sources used to corroborate secondary information may include, for example, published price lists, official import statistics, and customs data, as well as information obtained from interested parties.<sup>12</sup>

In the instant case, as reflected in *Initiation Notice*, the Department initiated on eleven estimated AD margins ranging from 129.4 percent to 218.1 percent, as submitted by Petitioners in the petition.<sup>13</sup> During the initiation stage, we examined evidence supporting the calculations in the petition and the supplemental information provided by Petitioners to determine the probative value of the margins alleged in the petition.<sup>14</sup> During our pre-initiation analysis, we examined the information used as the basis of export price and normal value (“NV”) in the petition, and the calculations used to derive the alleged margins.<sup>15</sup> Also, during our pre-initiation analysis, we examined information from various independent sources provided either in the petition or, based upon our requests, in supplements to the petition.<sup>16</sup>

For purposes of selecting the AFA rate for Nankai, the Department first attempted to corroborate the highest petition margin of 218.1 percent with information reasonably at our disposal. In doing so, we looked first to the transaction-specific margins for the other mandatory respondent,

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<sup>10</sup> See Memorandum to the File, through Scot T. Fullerton, Program Manager, Office V, from Julia Hancock, Senior Case Analyst, Re: Calculations Performed for Shikoku Chemicals Corporation for the Final Determination of Chlorinated Isocyanurates from Japan (September 8, 2014) (“Shikoku’s Final Analysis Memo”) at 1-2.

<sup>11</sup> See Statement of Administrative Action accompanying the URAA, H.R. Rep No. 103-316 (SAA) at 870.

<sup>12</sup> *Id.*

<sup>13</sup> See Petition for the Imposition of Antidumping Duties on Chlorinated Isocyanurates from Japan, (August 29, 2013) (“Petition”); Amended Supplement to the AD Petition, (September 10, 2013) (“Amended Supplement”) at Exhibit AD-26; Chlorinated Isocyanurates from Japan: *Initiation of Antidumping Duty Investigation*, 78 FR 58997, 58999-59000 (September 25, 2013) (“*Initiation Notice*”).

<sup>14</sup> See *Initiation Notice*, 78 FR at 58999-59000.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Shikoku.<sup>17</sup> We note, however, that we found no individual margins in the range of the highest petition margin(s) of 218.1 percent, 209.2 percent or 206.8 percent. Because we were unable to corroborate the highest petition margin(s) with individual margins from Shikoku, we next applied a component approach and compared the NVs and net U.S. prices underlying these three petition margins to the NVs and net U.S. prices calculated for the other mandatory respondent, Shikoku.<sup>18</sup> We find, however, that we are unable to corroborate the petition margins with this component approach. Specifically, the Department finds that the NVs and net U.S. prices calculated for the other mandatory respondent, Shikoku, are not within the range of the NVs and net U.S. prices underlying the three highest margins, *i.e.*, 218.1 percent, 209.2 percent, and 206.8 percent, alleged in the petition.<sup>19</sup>

However, the Department finds that it can corroborate the fourth highest margin, 151.8 percent, alleged in the petition, as the AFA rate for Nankai in the final determination.<sup>20</sup> Specifically, we find individual margins for Shikoku, a mandatory respondent in this investigation, in the range of the petition margin of 151.8 percent. Accordingly, in utilizing information that was found to be reliable in the pre-initiation stage of this investigation and determining it to be relevant for the uncooperative respondent in this investigation based on the data obtained from the sole cooperative respondent, we corroborated the rate of 151.8 percent for purposes of the final determination “to the extent practicable,” as provided in section 776(c) of the Act.<sup>21</sup> Therefore, with respect to Nankai, for the final determination, we used the petition margin of 151.8 percent, set forth in the *Initiation Notice*.<sup>22</sup>

## V. Margin Calculations

As noted above, for the non-participating mandatory respondent, Nankai, we have not calculated an AD margin but instead applied total facts available to Nankai for the final determination.<sup>23</sup>

<sup>17</sup> See Memorandum to the File, from Jerry Huang, Senior Case Analyst, through Scot T. Fullerton, Program Manager, Office V, Subject: Corroboration of the Total AFA Rate for Nankai in the Final Determination of the Antidumping Duty Investigation of Chlorinated Isocyanurates from Japan, (September 8, 2014) (“Corroboration Memo”); *Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 39940, 39943.

<sup>18</sup> See Corroboration Memo at Attachment 2; *Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 77 FR 17029, 17030 (March 23, 2012).

<sup>19</sup> *Id.*

<sup>20</sup> See *Initiation Notice*, 78 FR at 58999-59000; Corroboration Memo at Attachments 1 and 2.

<sup>21</sup> See also 19 CFR 351.308(d). See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar from the United Kingdom*, 66 FR 40192 (August 2, 2001) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from the United Kingdom*, 67 FR 3146 (January 23, 2002)).

<sup>22</sup> See *Initiation Notice*, 78 FR at 58999-59000.

<sup>23</sup> For further discussion, please see the accompanying *Federal Register* notice dated concurrently with this memorandum.



However, for the other participating mandatory respondent, Shikoku, we made the following changes from the *Preliminary Determination* to the HM margin program:<sup>24</sup>

1. For certain control numbers ("CONNUMs") due to errors in materials codes, Shikoku reported zero packaging costs in the May 7, 2014, cost database ("shikcp03"). For these CONNUMs, we adjusted the cost of manufacturing ("COM") to include the average of the packaging costs reported for the remaining CONNUMs with the same packaging type.
2. For a certain CONNUM in Shikoku's cost database, Shikoku underreported direct labor, fixed overhead, and packaging costs for this CONNUM due to an error. We adjusted the COM for this CONNUM by using the calculated labor and fixed overhead for the most similar CONNUM and the average packaging cost reported for the CONNUMs with the same packaging type.
3. In Shikoku's cost database, we adjusted the reported COM for the CONNUMs to include the raw materials inventory cost adjustment, freight on raw materials and valuation loss adjustment, which were excluded from the reported costs.
4. For Shikoku's cost database, the analysis of inputs purchased by Shikoku from its affiliate, Shikoku Kosan Corporation ("SKC"), indicates that the inputs were obtained at less than market value. Therefore, for the final determination, in accordance with section 773(f)(3) of the Act, we adjusted Shikoku's COM to reflect the market value of inputs purchased from SKC.
5. In Shikoku's cost database, we adjusted Shikoku's reported general and administrative ("G&A") expenses to exclude miscellaneous income items that are normally considered investment or financial income not related to the general operations of the company.
6. For the final determination, we deducted Shikoku's reported discounts from the gross unit price for HM sales in Shikoku's HM sales database ("shikhm06").<sup>25</sup>
7. We treated Shikoku's cost of Product B<sup>26</sup> and ancillary expenses as sales discounts in Shikoku's HM sales database.
8. We treated the technical service expenses for Product B also as a sales discount and the technical service expenses for chlorinated isos as direct selling expenses in Shikoku's HM sales database. Shikoku's reported total technical service expenses are segregated based on the ratio of technical service expenses for Product B and the ratio of technical service expenses for chlorinated isos.

<sup>24</sup> See also Memorandum to the File from Julia Hancock, Senior International Trade Analyst, Office V, through Scot T. Fullerton, Program Manager, Office V "Calculations Performed for Shikoku Chemicals Corporation for the Final Determination in the Antidumping Duty Investigation of Chlorinated Isocyanurates from Japan" ("Shikoku Final Analysis Memo") dated concurrently with this memorandum; see Memorandum to Neal M. Halper, Director, Office of Accounting, from Ernest Gziryan, Senior Accountant, through Peter Scholl, Lead Accountant "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Shikoku Chemicals Corporation" ("Shikoku Final Cost Calc Memo") dated concurrently with this memorandum.

<sup>25</sup> See Chlorinated Isocyanurates from Japan: Updated Databases to Reflect Minor Corrections Presented at Shikoku's Home Market and U.S. Sales Verification (July 9, 2014) at Exhibit 1.

<sup>26</sup> Because these sales discounts are business proprietary information, for further information, please see Shikoku Home Market Verification Report at 27-28 and VE M-28.

We made the following changes from the *Preliminary Determination* to the U.S. sales margin program for Shikoku:<sup>27</sup>

- We recalculated Shikoku's reported credit expenses after deducting discounts from the gross unit price of Shikoku's U.S. sales.

## VI. Discussion of the Issues

### Comment 1: Treatment of Shikoku's Claimed Direct Selling Expenses<sup>28</sup>

#### *Petitioners' Comments*

- Shikoku provided Product B<sup>29</sup> to a few HM customers and reported the cost of Product B and the related expenses for supplying Product B as direct selling expenses.
- In the *Preliminary Determination*, the Department appropriately denied Shikoku's request for a circumstance of sales ("COS") adjustment, pursuant to section 773(a)(6)(C)(iii) of the Act, for the cost of Product B and the associated ancillary expenses.<sup>30</sup>
- Shikoku conceded that there is no contractual obligation for these HM customers to buy chlorinated isos from Shikoku because these HM customers received Product B.
- Shikoku never established that its sales of chlorinated isos resulted from the provision of Product B to these HM customers.
- Shikoku conceded that while Product B typically uses Shikoku-produced chlorinated isos, Product B may also be used with chlorinated isos produced from other manufacturers.<sup>31</sup>
- At verification, Shikoku informed the Department that, except for the few HM customers that received Product B, other HM customers purchased Product B from Shikoku.
- To qualify for a COS adjustment, the adjustment must be part of the sales agreement between the seller and the purchaser or otherwise arise as a result of transactions involving the subject merchandise.<sup>32</sup>
- The record evidence does not establish that the ultimate customer must buy a particular quantity of chlorinated isos from Shikoku to receive Product B and the cost of Product B does not vary with the quantity of chlorinated isos sold by Shikoku.<sup>33</sup>
- The cost and related expenses for Product B that Shikoku provided to certain HM customers cannot be considered an advertising or promotional expense because these

<sup>27</sup> *Id.*

<sup>28</sup> Because these claimed direct selling expenses are business proprietary information, for further information, please see Shikoku Home Market Verification Report at 27-28 and VE M-28.

<sup>29</sup> Because Product B is business proprietary information, for further information, please see Petitioners' Rebuttal Brief at 3-11.

<sup>30</sup> See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 18.

<sup>31</sup> See Shikoku's Supplemental Section B Questionnaire Response (March 26, 2014) at 11 ("Shikoku's SSBQR").

<sup>32</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock from the United Kingdom*, 61 FR 51411, 51416-7 (October 2, 1996).

<sup>33</sup> See *Zenith Elecs. Corp v. United States*, 77 F.3d 426, 431 (CAFC 1996).



types of expenses need to pertain to subject merchandise or be directed at the customer's customer.<sup>34</sup>

- The record shows that Shikoku did not provide Product B to a few HM customers to advertise or promote, such as through caps, pens, T-shirts, *etc.*, sales of chlorinated isos.<sup>35</sup> Instead, these HM customers approached Shikoku to provide Product B, which Shikoku agreed to do.
- In *Lined Paper from Italy*, the Department found that because an expense (canvassing) is aimed at the customer increasing the customer's sales to other customers, this does not mean that salary is an "assumed expense."<sup>36</sup>
- Like *PTFE Resin*, the cost and related expenses for Product B that Shikoku provided to certain HM customers is similar to a flat fee that is incurred whether or not the sale of subject merchandise took place.<sup>37</sup>

#### *Shikoku's Comments*

- Shikoku properly reported the cost and related expenses for Product B as direct selling expenses.<sup>38</sup>
- The purpose of this marketing strategy was to incentivize Shikoku's end-user customers to purchase Shikoku-produced chlorinated isos.
- Since the Department first raised concerns about Shikoku's reported expenses regarding Product B in the *Preliminary Determination*, the administrative record now shows that Shikoku's cost and related expenses for Product B are direct selling expenses.<sup>39</sup>
- The record evidence shows that end-user customers that received Product B from Shikoku did ultimately purchase Shikoku-produced chlorinated isos that is specific to the that type of Product B supplied by Shikoku, confirming they functioned as promotional materials.
- The cost and related expenses for Product B are also "assumed expenses" because Shikoku assumes the expenses on behalf of Shikoku's customers' customer, *i.e.*, end-user.<sup>40</sup>
- The Department's AD Manual stipulates that "assumed expenses" may "involve sales promotional material" that "often take the form of free give-away merchandise supplied by the exporter to be given to the customers' customer."<sup>41</sup>

<sup>34</sup> See *Granular Polytetrafluoroethylene Resin From Japan; Final Results of Antidumping Duty Administrative Review*, 58 FR 50343, 50354 (September 27, 1993) ("PTFE Resin").

<sup>35</sup> See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy*, 65 FR 7349, 7358 (February 14, 2000).

<sup>36</sup> See *Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 77 FR 14729 (March 13, 2012) ("*Lined Paper from Italy*"), and accompanying Issues and Decision Memorandum at Comment 5.

<sup>37</sup> See *PTFE Resin*, 58 FR at 50344.

<sup>38</sup> Because Product B is business proprietary information, for further information, please see Shikoku's Case Brief at 4-15.

<sup>39</sup> See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 18.

<sup>40</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012) ("*Refrigerator-Freezers from Korea*"), and accompanying Issues and Decision Memorandum at Comments 8 and 24.

<sup>41</sup> See AD Manual, Ch. 8, 33-4.

- At verification, the Department noted that Shikoku's affiliate, Shikoku Kosan Corporation ("SKC"), provided services for certain models of Product B provided to certain market customers. The costs associated with these services are insignificant, pursuant to 19 CFR 351.413, and do not provide a justification for rejecting Shikoku's cost for Product B.
- Although no adjustment is necessary, the Department can remove the cost of SKC's services from the total cost of Product B based on a one-month sample cost from a certain model of Product B, which is in accordance with the Department's practice.<sup>42</sup>

**Department's Position:** The Department determines to treat Shikoku's provision of Product B and related expenses as an adjustment to Shikoku's price charged for certain HM sales, pursuant to 19 CFR 351.102(b)(38), for the final determination.<sup>43</sup>

In the *Preliminary Determination*, the Department found that there was "insufficient record evidence to conclusively establish that Product B was subject merchandise, that this merchandise was shipped with {chlorinated} isos products, that this merchandise was only compatible with Shikoku's {chlorinated} isos products, and that this merchandise, either directly or indirectly, bears a relationship to the sale of Shikoku's {chlorinated} isos in the home market."<sup>44</sup> Accordingly, the Department chose to not make an adjustment to Shikoku's price for HM sales by the reported expenses for the provision of Product B to Shikoku's HM customers for the *Preliminary Determination*.<sup>45</sup>

Since the *Preliminary Determination*, the Department verified the provision of Product B to certain HM customers and through these customers to the final end-user.<sup>46</sup> The Department noted at verification that sample Shikoku brochures for Product B, sales documentation, and an industry agreement supports the link between Product B and chlorinated isos as they note specific types of Product B are associated with the requirement to use specific types of chlorinated isos.<sup>47</sup> Additionally, Shikoku stated that Shikoku's HM distributors and the final, end-user customers purchase chlorinated isos from Shikoku because the types of Product B supplied by Shikoku are specific to Shikoku-produced chlorinated isos.<sup>48</sup> Moreover, Shikoku noted that it provided Product B to a few HM distributors and then the final, end-user customers as a plan for generating sales.<sup>49</sup> We found nothing at verification contrary to those explanations.

<sup>42</sup> See *Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*, 76 FR 17819, 17824 (March 31, 2011); *Refrigerator-Freezers from Korea*, and accompanying Issues and Decision Memorandum at Comment 14.

<sup>43</sup> See *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 67313 (November 17, 2004) ("*Furniture from the PRC LTFV*"), and accompanying Issues and Decision Memorandum at Comment 37.

<sup>44</sup> See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 18.

<sup>45</sup> *Id.*

<sup>46</sup> See Shikoku's Home Market Verification Report at 27-8 and VE M-28.

<sup>47</sup> *Id.*; because this is business proprietary information, for further discussion, please see Shikoku Final Analysis Memo at 3-5.

<sup>48</sup> See Shikoku's Home Market Verification Report at 27-8 and VE M-28.

<sup>49</sup> *Id.*

Given the record of the instant case, the Department now finds the provision of Product B and related expenses to be akin to a discount, requiring a price adjustment. This treatment is consistent with the Department's practice in *Furniture from the PRC LTFV*.<sup>50</sup> In *Furniture from the PRC LTFV*, the Department treated items, which included spare parts for both subject and non-subject merchandise, as a sales discount because these items resulted in an "effective reduction of U.S. price of the subject merchandise due to the inclusion of these free spare parts in the invoices."<sup>51</sup>

Similar to the Department's reasoning in *Furniture from the PRC LTFV*, here, the Department finds the cost and related expenses of providing Product B to certain number of Shikoku's HM customers and to the final, end-user customer, should be treated as a discount requiring an adjustment to Shikoku's starting price, pursuant to 19 CFR 351.102(b)(38).<sup>52</sup> The Department finds that the cost and related expenses of providing Product B should be treated as a price adjustment because Product B is a commercial product used with chlorinated isos, as the record demonstrates, and thus has commercial value.<sup>53</sup> As Shikoku provided the commercially valuable Product B to certain HM customers with their chlorinated isos orders, Shikoku bore the cost of Product B and thus effectively reduced the price of the sales of subject merchandise, making the provision of Product B akin to a discount or price adjustment.<sup>54</sup>

In accordance with 19 CFR 351.102(b)(38), the Department defines a price adjustment as: any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates, and post-sale price adjustments that are reflected in the purchaser's net outlay.<sup>55</sup> As specified in the *Preamble* of the Department's regulations, the Department treats discounts, rebates, and other types of price adjustments not as selling expenses, but as a part of the price itself.<sup>56</sup> Specifically, as stated in *Orange Juice from Brazil LTFV Final*<sup>57</sup>, price adjustment are changes that the Department must take into account in identifying the actual starting price (*i.e.*, either as additions or deductions to the starting price).<sup>58</sup> Therefore, for this price adjustment, the Department need not determine whether the provision of Product B is a direct or indirect selling expense.

With respect to Shikoku's reliance on *Refrigerator-Freezers from Korea* to support its argument that the provision of Product B should be treated as a direct selling expense,<sup>59</sup> the Department finds that this case is not on point. In *Refrigerator-Freezers from Korea*, the Department treated a respondent's advertising expenses related to the subject merchandise as a direct selling

<sup>50</sup> See *Furniture from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 37.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Shikoku's Home Market Verification Report at 27-8 and VE M-28.

<sup>54</sup> See Shikoku's SSBQR at 11.

<sup>55</sup> See 19 CFR 351.102(b).

<sup>56</sup> See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27300 (*Preamble*).

<sup>57</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 FR 2183 (January 13, 2006) ("*Orange Juice from Brazil LTFV Final*"), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>58</sup> *Id.*

<sup>59</sup> See Shikoku's Case Brief at 7-8.

expense.<sup>60</sup> Here, however, the circumstances are different.<sup>61</sup> Product B is not an advertisement or promotional material, such as an athletic bag, t-shirt, or key chain, which convey a message or promote the product to potential customers.<sup>62</sup> Thus, the rationale in *Refrigerator-Freezers from Korea* is not applicable.<sup>63</sup>

Accordingly, for the final determination, the Department revised its calculation of Shikoku's price for HM sales based on a reasonable allocation of the expenses associated with Product B and accordingly adjusted Shikoku's price for certain HM sales by these adjustments.

Additionally, Shikoku argues that certain services<sup>64</sup> provided by its affiliate, SKC, related to the cost for Shikoku's provision of Product B are minor and therefore do not require an adjustment to the overall cost of providing Product B to the HM customers, pursuant to 19 CFR 351.413. The Department notes that it was not informed by Shikoku until verification that the total cost of Product B included the cost of the services provided by Shikoku's affiliate, SKC.<sup>65</sup> At verification, the Department was informed by Shikoku that Shikoku's affiliate, SKC, provided certain services for certain models of Product B that Shikoku provided to certain HM customers.<sup>66</sup> The Department, in the context of verification, gathered a sample invoice from Shikoku's affiliate, SKC, to Shikoku for the provision of these services for Product B for one month of the POI.<sup>67</sup>

The Department finds that there is insufficient information on the record to determine the significance of the cost of the services provided by Shikoku's affiliate, SKC, for certain models of Product B. The only information that the Department has on the record regarding the cost of the services provided by Shikoku's SKC, for certain models of Product B is a sample invoice for a single month of the POI.<sup>68</sup> Consequently, there is insufficient information on the record, for the Department to determine the actual cost associated with the services provided by SKC for certain models of Product B. Without this information, the Department cannot determine the significance of the cost of the services provided by SKC. Accordingly, the Department will not make an adjustment to the total cost of Product for the final determination.

<sup>60</sup> See *Refrigerator-Freezers from Korea*, and accompanying Issues and Decision Memorandum at Comments 8 and 24.

<sup>61</sup> *Id.*

<sup>62</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 FR 30326 (June 14, 1996) and accompanying Issues and Decision Memorandum at Comments 2A (where the Department found that the respondent's sponsorship of a TV program where the respondent's pasta was prominently displayed should be treated as direct advertising expenses) and 2B (where the Department found that the respondent's trade promotion expenses should be treated as direct advertising expenses because the expenses were directed to the ultimate consumer (i.e., retail shoppers of the respondent's pasta product)).

<sup>63</sup> See *Refrigerator-Freezers from Korea*, and accompanying Issues and Decision Memorandum at Comments 8 and 24.

<sup>64</sup> Because this information is business proprietary information, a further explanation and discussion of these services are included in Shikoku's Final Analysis Memo at 4-5.

<sup>65</sup> See Shikoku's Home Market Verification Report at 28.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, at 28 and VE M-28.

<sup>68</sup> *Id.*

## Comment 2: Treatment of Shikoku's Technical Service Expenses

### *Petitioners' Comments*

- The record evidence does not reflect that Shikoku's reported technical service expenses directly related to the sale of chlorinated isos because certain of Shikoku's technical service expenses were for Product B.
- At verification, the Department confirmed that the technical services expenses for Product B<sup>69</sup> are not related to the sale of chlorinated isos or, at a minimum, incidentally related to the sale of chlorinated isos to the final customer.<sup>70</sup>
- Because it is unclear whether Shikoku's technical service expenses relate to subject merchandise, the Department has no justification for accepting Shikoku's allocation methodology that includes expenses for non-subject merchandise.<sup>71</sup>
- The Department should continue to treat all of Shikoku's technical service expenses as indirect selling expenses because there is no evidence that these expenses are directly tied to a particular sale or volume of chlorinated isos.

### *Shikoku's Comments*

- The Department's AD Manual stipulates that technical service expenses may be treated as direct selling expenses if the expense is variable in nature, such as travel expenses, and is the result of sales of subject merchandise.<sup>72</sup>
- Shikoku's technical service expenses for Product B and chlorinated isos are variable in nature and these expenses would not have incurred in the absence of Shikoku's sales of chlorinated isos products.
- Citing to *Color Picture Tubes from Japan*, *Antifriction Bearings from Germany*, and *Flux from France*, the Department has a practice of treating technical service expenses as a direct selling expense.<sup>73</sup>
- Shikoku's inability to report the technical service expenses related to chlorinated isos products separate from expenses related to non-subject products does not provide the Department with a legal basis to reject Shikoku's allocation of technical service expenses.
- 19 CFR 351.401(g)(1)-(3) stipulates that the respondent may report allocated expenses so long as they are in accordance with the respondent's accounting records, are not distortive, and are as accurate as possible.

<sup>69</sup> Because Product B is business proprietary information, for further information, please see Petitioners' Rebuttal Brief at 12-16.

<sup>70</sup> See *PTFE Resin*, 58 FR at 50344.

<sup>71</sup> See 19 CFR 351.401(g)(4)

<sup>72</sup> See AD Manual, Ch. 8, at 38-9.

<sup>73</sup> See *Color Picture Tubes from Japan: Final Results of Antidumping Duty Administrative Review*, 62 FR 34201, 34202-3 (June 25, 1997) ("*Color Picture Tubes from Japan*"), and accompanying Issues and Decision Memorandum at Comments 1 and 2; *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 FR 18992 (May 3, 1989) ("*Antifriction Bearings from Germany*"), and accompanying Issues and Decision Memorandum at Comment 73; and *Final Determinations of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux From France*, 59 FR 14136 (March 25, 1994) ("*Flux from France*"), and accompanying Issues and Decision Memorandum at Comment 13.



- The technical service expenses related to Product B bear a direct relationship to the sales of Shikoku's chlorinated isos products because the maintenance of Product B allows Shikoku to continue selling chlorinated isos to these HM customers.

**Department's Position:** The Department agrees, in part, with Shikoku that Shikoku's reported technical service expenses for HM sales of chlorinated isos should be treated as a direct selling expense for the final determination. However, the Department finds that Shikoku's technical service expenses for Product B<sup>74</sup> should be treated as an adjustment to Shikoku's price for certain HM sales because the provision of Product B is being treated as a sales discount for the final determination, as discussed above in Comment 1.

In Shikoku's HM sales questionnaire responses, it reported technical service expenses for both the proper use of chlorinated isos products and Product B at the location of the final, end-user customers.<sup>75</sup> As with the provision of Product B itself, Shikoku reported the technical service expenses for Product B as direct selling expenses because these expenses facilitated the continued sales of chlorinated isos in the HM.<sup>76</sup> In the *Preliminary Determination*, the Department determined to treat Shikoku's reported technical service expenses for its HM sales as indirect selling expenses because "Shikoku's reported technical service expenses include{d} maintenance for merchandise that the Department {wa}s unable to determine whether it should be classified as subject merchandise."<sup>77</sup>

After the *Preliminary Determination*, the Department received additional information, which was specifically requested by the Department in a post-preliminary supplemental questionnaire, from Shikoku regarding its total reported technical service expenses for its HM sales. Specifically, Shikoku provided a ratio for the technical service expenses incurred for chlorinated isos products and for the technical service expenses incurred for Product B.<sup>78</sup>

Additionally, since the *Preliminary Determination*, the Department verified the nature of the technical service expenses reported by Shikoku for its chlorinated isos products and for Product B in the HM.<sup>79</sup> The Department noted that at the time of sale, Shikoku's sales personnel informed Shikoku's HM customers that Shikoku would provide technical services for these products.<sup>80</sup> The Department found that Shikoku tracked its technical service expenses for chlorinated isos based on service reports provided by Shikoku's HM customers for Shikoku's repair personnel services on chlorinated isos.<sup>81</sup> This was supported by the sample work

<sup>74</sup> Because Product B is business proprietary information, for further information, please see Petitioners' Rebuttal Brief at 12-16.

<sup>75</sup> See Shikoku's SSBQR at 8-9 and Exhibit SB-6.

<sup>76</sup> *Id.*, at 9; Shikoku's Section B Questionnaire Response (January 23, 2014) at B-25.

<sup>77</sup> See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 10, footnotes 78 and 79.

<sup>78</sup> See Shikoku's Post-Preliminary Determination Supplemental Sections A, B, and C Questionnaire Response (May 13, 2014) at 5 and Exhibit 5; Shikoku's Post-Preliminary Determination Supplemental Sections A, B, and C Questionnaire (April 30, 2014) at 4 (question 8).

<sup>79</sup> See Shikoku's Home Market Verification Report at 28 and VE M-26.

<sup>80</sup> *Id.*, at 28.

<sup>81</sup> *Id.*

procedure report provided by Shikoku at verification, demonstrating the individual technical services that Shikoku's personnel provided to Shikoku's HM customers for chlorinated isos.<sup>82</sup>

For Shikoku's technical service expenses for Product B in the HM, at verification, the Department noted the technical service expenses for Product B were compiled from service reports provided by Shikoku's personnel.<sup>83</sup> This is supported by the sample work procedure reports provided by Shikoku at verification, which reflected the individual technical services that Shikoku's repair personnel provided to Shikoku's HM customers for Product B.<sup>84</sup>

Based on the totality of the record evidence, the Department finds that Shikoku's reported technical service expenses for chlorinated isos products in the HM should be classified as a direct selling expense for the final determination. Specifically, the Department finds that Shikoku's technical service expenses for chlorinated isos products are variable expenses that would not have occurred if the subject sales in question had not been made. Although Shikoku's reported technical service expenses for chlorinated isos products are not tied to individual sales, the Department finds that these service expenses would not have occurred but for the sale of the subject merchandise.<sup>85</sup> As discussed above, when Shikoku's personnel negotiates sales of chlorinated isos with the HM customers, they inform the HM customers that Shikoku will provide technical support for these products, as they arise.<sup>86</sup> Accordingly, for the final determination, the Department will treat Shikoku's reported technical service expenses for chlorinated isos products in the HM as a direct selling expense.

However, for Shikoku's reported technical service expenses for Product B, the Department finds that these technical service expenses, as discussed above in Comment 1, are considered a price adjustment to the gross unit price for these HM customers. Specifically, the Department finds that Shikoku's reported technical service expenses are for servicing Product B, the provision of which the Department has determined was a discount, as discussed above in Comment 1.<sup>87</sup> As specified in the *Preamble* of the Department's regulations, the Department treats discounts, rebates, and other types of price adjustments not as selling expenses, but as a part of the price itself.<sup>88</sup>

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<sup>82</sup> *Id.*, at 28 and VE M-26.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *Color Picture Tubes from Japan*, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>86</sup> See Shikoku Home Market Verification Report at 28.

<sup>87</sup> See *Furniture from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 37, where the Department treated Dorbest's free-of-charge items as a sales discount because these free-of-charge items, which included spare parts, resulted in an "effective reduction of U.S. price of the subject merchandise due to the inclusion of these free spare parts in the invoices."

<sup>88</sup> See *Preamble*, 62 FR 27296, 27300.

Following this, the Department finds that the record evidence<sup>89</sup> reflects that the cost and other associated expenses, such as the technical service expenses, for Product B should be considered as part of certain HM sales because the provision of Product B, and services connected with the provision of Product B, are necessarily linked to the sale to the final, end-user.<sup>90</sup> Accordingly, the Department finds that Shikoku's reported technical service expenses related to Product B should be treated as an adjustment to Shikoku's price for certain HM sales in the final determination.

Finally, with respect to Shikoku's argument that the Department should accept Shikoku's treatment of technical service expenses as direct selling expenses because Shikoku's reporting methodology is consistent with Shikoku's accounting records, the Department disagrees. Although the Department normally allows respondents to report allocated expenses consistent with the respondents' accounting records, the Department notes that this is contingent upon the Department accepting the respondents' classification of its expenses as being in accordance with the Department's practice and regulations.<sup>91</sup> As discussed above, the Department finds that only Shikoku's technical service expenses for chlorinated isos products in the HM should be classified as a direct selling expense, pursuant to section 773(a)(6) of the Act and 19 CFR 351.410. In contrast, the Department finds that the technical service expenses for Product B should be classified as an adjustment to Shikoku's starting price, pursuant to section 772(c) of the Act. Therefore, for the final determination, the Department will recalculate Shikoku's reported total technical services using the reported ratio for technical service expenses for chlorinated isos products and the reported ratio for technical service expenses for Product B.<sup>92</sup>

**Comment 3: Treatment of Input X<sup>93</sup> Between Shikoku and Shikoku Kosan Corporation ("SKC")**

*Petitioners' Comments*

- The focus of Shikoku's argument is that the prices for Input X from the unaffiliated producers should not be compared to the price from SKC because SKC provided Input X for Shikoku, for which Shikoku incurred some of the expenses. In contrast, the unaffiliated producers incurred all of these expenses for Input X.
- At verification, the Department's calculation of a constructed price for SKC's provision of Input X, which included additional expenses, shows a difference between SKC's price for provision of Input X and the price from the unaffiliated supplier.<sup>94</sup>

<sup>89</sup> This includes sales and delivery documentation from Shikoku to the home market customer for Product B, a delivery note from the home market customer to the final, end-user customer for Product B, and sales documentation from the home market customer to the final, end-user customer for purchase of Shikoku-produced chlorinated isos specific to Product B. See Shikoku's SSBQR at 11-12 and Exhibits SB-8 through SB-11; Shikoku's Home Market Verification Report at VE M-28.

<sup>90</sup> See *Orange Juice From Brazil LTFV Final*, and accompanying Issues and Decision Memorandum at Comment 8; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum at Comment 21.

<sup>91</sup> See 19 CFR 351.401(g)(1)-(3).

<sup>92</sup> See Shikoku's Home Market Verification Report at 28 and VE M-26.

<sup>93</sup> Because Input X is business proprietary information, for further information, please see Shikoku Cost Verification Report at 20-21; and Shikoku's Case Brief at 21-24.

<sup>94</sup> See Shikoku Home Market Verification Report at 21.

- The difference between the price for Input X charged by SKC and the price from the unaffiliated supplier cannot be explained due to the inclusion of certain additional expenses, as explained by Shikoku.
- The Department should continue to adjust the transfer price from SKC for Input X so that it reflects market prices for the final determination because Shikoku failed to provide evidence that this price is at arm's length.<sup>95</sup>

#### *Shikoku's Comments*

- The Department typically examines transactions between affiliates and prices paid for similar transactions with unaffiliated parties to determine whether the affiliated price is made at arm's length. In the alternative, the Department examines whether the respondents' prices paid to the affiliates were above the affiliate's cost of production ("COP") or the affiliate was profitable.<sup>96</sup>
- The prices paid by Shikoku to its affiliate, SKC, and the prices paid to the unaffiliated company for Input X are not comparable for the Department's arm's length test, nor can the unaffiliated prices be used as a proxy for the market value of Input X provided by SKC.
- Shikoku reported that the prices it paid SKC for Input X were above SKC's COP and that there is no available means to calculate SKC's cost for providing Input X in the manner typically required by the Department.
- Shikoku calculated SKC's COP by deducting SKC's profit margin from the price that Shikoku paid for Input X. The Department confirmed at verification that SKC earned a profit on the provision of Input X to Shikoku, which shows that these affiliated prices are at arm's length.
- Comparing the price from SKC for Input X to the price from the unaffiliated producer is not a reasonable benchmark for determining whether SKC's price is reflective of market prices. This is because the costs associated with Input X provided by SKC and the unaffiliated producer are fundamentally different due to the fact that SKC's price is limited to the cost of Input X and does not include additional expenses.<sup>97</sup>
- In contrast to SKC's price for Input X, the price from the unaffiliated producer includes additional expenses and thus the cost incurred by the unaffiliated producer is higher than SKC's cost. Accordingly, the prices charged by SKC and the unaffiliated producer are not meaningful due to the fundamental differences in their cost structures.
- At verification, the Department calculated a constructed price for Input X charged by SKC by including additional costs that Shikoku incurred and then compared this constructed price to the price from the unaffiliated producer. However, this comparison does not accurately capture all of the differences between the prices paid to SKC and the unaffiliated producer because the constructed price for SKC does not include all relevant costs incurred by Shikoku.

<sup>95</sup> See *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 76 FR 12700 (March 8, 2011) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>96</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon – Quality Steel Products from Brazil*, 64 FR 38756, 38782 (July 19, 1999) ("Steel Products from Brazil").

<sup>97</sup> Because these additional expenses are business proprietary information, for further information, please see Shikoku's Case Brief at 24.

- The record demonstrates that price that Shikoku pays SKC for Input X is greater than SKC's COP and is a market price.
- If the Department determines to make an adjustment, the adjustment should only be made to Product A because Input X was only provided for Product A.<sup>98</sup>

**Department's Position:** The Department agrees with Petitioners that SKC's price to Shikoku for the provision of Input X was not made at arm's length. For the final determination, the Department analyzed whether the inputs that Shikoku sourced from an affiliate were at arm's length and determined that the transactions with the affiliate were not at arm's length. Because this analysis contains business proprietary information, for further discussion of this analysis, please see the Shikoku Final Cost Calc Memo.

Pursuant to section 773(f)(3) of the Act, the Department may value inputs purchased from affiliated parties at the higher of the market value, transfer price or the affiliated supplier's COP.<sup>99</sup> According to 19 CFR 351.407(b), the Department will determine the value of the major input purchased from an affiliated person based on the higher of: 1) the price paid by the exporter or producer to the affiliated person for the major input; 2) the amount usually reflected in sales of the major input in the market under consideration; and 3) the cost to the affiliated person of producing the major input. The Department relied on this methodology in other cases, which has been upheld by the U.S. Court of International Trade ("CIT").<sup>100</sup> The Department examined Shikoku's purchases from SKC for provision of Input X, as directed by section 773(f)(3) of the Act and 19 CFR 351.407(b), and found the amount usually reflected in sales of the major input in the market under consideration to be the highest figure. Therefore, the Department adjusted the transfer price to reflect the market price for such affiliated party transactions.

Shikoku presented various arguments as to what is an appropriate market price to use in the major input analysis. In accordance with our practice, as outlined by the CIT in *Huvis*, "[t]he Major Input Rule provides that when a respondent purchases a major input from an affiliated supplier, the United States Department of Commerce will compare the price paid by the respondent to the affiliated supplier (called the "transfer price") to: (a) the price at which the supplier sells the input to unaffiliated buyers ("market price"), and (b) the supplier's cost of producing the input."<sup>101</sup> As noted by Shikoku, in instances where the unaffiliated (*i.e.*, market)

<sup>98</sup> Because Product A is business proprietary information, for further information, please see Shikoku's Case Brief at 26. For a description of Shikoku's calculation for the adjustment of direct labor and variable overhead costs for Product A, please see Shikoku's Case Brief at Exhibit 2.

<sup>99</sup> See 19 CFR 351.407(b).

<sup>100</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Taiwan*, 64 FR 17336, 17337 (April 9, 1999); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France: Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 FR 36551 (July 12, 2001), and accompanying Issues and Decision Memorandum at Comment 1; see *Mannesman v. United States*, 77 F. Supp 2d 1302 (CIT 1999).

<sup>101</sup> See *Huvis Corp. v. United States*, 32 CIT 845, 845 (CIT 2008) ("*Huvis*").



price is not available, the Department may use alternative methods of deriving the market price, including relying on the affiliated supplier's COP as a surrogate for market value.<sup>102</sup>

Shikoku contends that the Department should examine whether its prices paid to its affiliate were at prices above the COP or whether the affiliate was profitable to determine an appropriate market price to use in the comparison to transfer price. Although, the Department has used alternatives for market price in the past, the Department does not need to resort to an alternative method for determining the market price in this case because Shikoku provided a price from an unaffiliated supplier for the same inputs, which is the Department's preferred method, as noted in *Huvis*.

Shikoku argues that it is meaningless to compare the prices charged by SKC and the unaffiliated supplier because of the differences in prices and the underlying cost structures between the companies, which are proprietary and further discussed in the Shikoku Final Cost Calc Memo.<sup>103</sup> The Department agrees with Shikoku. In the Department's analysis, the Department adjusted the transfer price paid to SKC to account for such differences. Moreover, contrary to Shikoku's assertion that the constructed price does not include these proprietary differences, the Department's adjustment accounts for the specific proprietary costs mentioned by Shikoku. As stated in the Shikoku Cost Verification Report, these proprietary costs are normally recorded by Shikoku as fixed overhead, and the Department's adjustment included fixed overhead costs for the final determination.<sup>104</sup>

Finally, the Department disagrees with Shikoku's suggestion that, should the Department make an adjustment to Shikoku's costs, such an adjustment should only be applied to the cost of one product for which the market price was provided. In its questionnaire, the Department requested that Shikoku provide market prices for the inputs purchased from SKC, to which Shikoku replied that it "does not have a basis" to report the market value of the inputs and instead provided a market price for only one product.<sup>105</sup> The Department notes that our objective is to analyze the arm's length nature of prices paid not only for the one product, but for all products obtained from the same affiliated supplier. Because the price for this one product is the only market price information available on the record, the Department believes that it is necessary to consider the price difference for this product provided by SKC and its unaffiliated supplier to be a reasonable basis for the corresponding price differences for all inputs purchased from SKC. Accordingly, for the final determination, the Department analyzed the difference between the transfer price, cost and market price for this product and applied the observed difference to all inputs obtained from SKC.<sup>106</sup>

<sup>102</sup> See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (April 16, 2004); and ("Steel Products from Brazil"), 64 FR at 38782.

<sup>103</sup> See Shikoku Final Cost Calc Memo at Attachment 2.

<sup>104</sup> See Shikoku Cost Verification Report at 20 and Cost Verification Exhibits 10 and 16.

<sup>105</sup> See Shikoku's 1st Supplemental Section D Questionnaire Response (April 16, 2014) at 7 ("Shikoku's 1<sup>st</sup> SDQR").

<sup>106</sup> See Shikoku Final Cost Calc Memo at Attachment 2.

**Comment 4: Application of “Transactions Disregarded” Rule for Shikoku’s Purchases of Product X<sup>107</sup> through Shikoku’s Affiliate A<sup>108</sup>**

*Petitioners’ Comments*

- Did not comment on this issue.

*Shikoku’s Comments*

- In the *Preliminary Determination*, the Department applied the “transactions disregarded” rule to Shikoku’s purchases of Product X, which is used in the production of the subject merchandise, through Shikoku’s affiliate/purchase agent, Affiliate A, and determined that Shikoku purchased Product X at less than market value.
- The Department’s decision to apply the “transactions disregarded” rule is an error because Affiliate A is Shikoku’s purchasing agent and not the supplier of Product X.
- During the cost verification, Shikoku presented as a minor correction that it incorrectly identified Affiliate A as a supplier of Product X when, in fact, Affiliate A is only the buying agent for Shikoku.
- The Shikoku Cost Verification Report confirms that Shikoku controls all purchases of Product X, negotiates directly with unaffiliated producers, and directly invoices the unaffiliated producers.
- The Shikoku Cost Verification Report also notes that Affiliate A’s role is limited to acting as a commissioned sales agent, which is why the commissions charged by Affiliate A are higher than those charged by unaffiliated party and reflect market prices.

**Department’s Position:** The Department agrees with Shikoku that the “transactions disregarded” rule should not apply to Shikoku’s purchases of the input, Product X, through Shikoku’s affiliate/purchase agent, Affiliate A. Under section 773(f)(2) of the Act, the “transactions disregarded” rule, the Department’s established practice is to value the input at the higher of the transfer price or the market price for the input when a respondent purchases inputs from an affiliated supplier.<sup>109</sup> However, for the final determination, the Department does not consider the transactions with the unaffiliated suppliers in this case affiliated transactions within the meaning of the “transaction disregarded” rule of section 773(f)(2) of the Act. Record evidence shows that Affiliate A acted as a commissioned sales agent and not as a supplier of the input, and that Shikoku negotiated the purchases of the input with its unaffiliated suppliers and the suppliers invoiced Shikoku directly for the input. Because Shikoku controlled all aspects of the input purchases, the Department considers these purchases to be transactions between Shikoku and unaffiliated suppliers, rather than transactions with Affiliate A. Accordingly, because the purchases are transactions with unaffiliated suppliers, the Department has made no adjustments to the value of inputs purchased through the commissioned sales agent, Affiliate A.

<sup>107</sup> Because Product X is business proprietary information, for further information, please *see* Shikoku’s Case Brief at 26-28.

<sup>108</sup> Because Affiliate A is business proprietary information, for further information, please *see* Shikoku’s Case Brief at 26-28.

<sup>109</sup> *See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 5.

**Comment 5: Whether Packaging Should Be Included As A Physical Characteristic**  
*Petitioners' Comments*

- In *Washington Red Raspberry*, the Court of Appeals for the Federal Circuit (“CAFC”) held that packing costs should only be included in the total cost of materials (“COM”) and not treated as a packing cost under certain exceptional situations, *i.e.*, the product cannot exist in the natural form unless held in a container.<sup>110</sup>
- The exception identified in *Washington Red Raspberry* does not apply to the instant case because there is no evidence that packaging, such as bagging of trichlor or dichlor products, changes the physical characteristics of the merchandise.<sup>111</sup>
- Contrary to Shikoku’s statements on the record that supersacks are an integral part of the final chlorinated isos product, there is no record evidence demonstrating that chlorinated isos “could not exist” outside of the supersacks.
- There is no record evidence that the specific packaging requirements for chlorinated isos changes the physical characteristics of chlorinated isos and thus does not support including packing costs as a direct cost for purposes of the difference-in-merchandise (“DIFMER”) test.
- In *Cement from France*, the Department noted that the customer’s choice to buy the final merchandise without specific packaging requirements supports the conclusion that packaging, such as bagging, is not an integral part of the product.<sup>112</sup> Thus, packaging should not be considered part of the variable cost of manufacturing (“VCOM”) and included in the DIFMER test.

*Shikoku's Comments*

- The Department specifically identified packaging as a relevant physical characteristic and a key component in defining the CONNUM upon which the price, production costs and product comparisons are all based.
- Because the Department determined that packaging is a main physical characteristic of chlorinated isos and included packaging as part of its CONNUM reporting requirements, Shikoku complied with these CONNUM reporting requirements. The record evidence shows that packaging forms part of the finished product of chlorinated isos because the packaging encases the product to protect it from accumulating moisture and contamination, which would otherwise render the product unusable.<sup>113</sup>
- Petitioners’ request to not include packaging as a physical characteristic in its case brief is an untimely argument and should be rejected.
- In the *Initiation Notice* of this investigation, the Department invited parties to comment on the physical characteristics of chlorinated isos that parties believed would be relevant

<sup>110</sup> See *Washington Red Raspberry Comm’n v. United States*, 859 F. 2d 898, 905 (CAFC 1998) (“*Washington Red Raspberry*”).

<sup>111</sup> *Id.*, 859 F. 2d at 905; *Final Determinations of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France*, 59 FR 14136, 14144 (March 25, 1994) (“*Cement from France*”).

<sup>112</sup> *Id.*

<sup>113</sup> See Shikoku Cost Verification Report at 19.

to determining accurate product comparisons.<sup>114</sup> However, Petitioners never submitted comments.<sup>115</sup>

- Since the *Initiation* of this investigation and until submission of their case brief, Petitioners never raised the issue of the appropriateness of including packaging as a physical characteristic. Petitioners have a history of participation in the Department's AD proceedings on *Chlorinated Isocyanurates from Spain* and *Chlorinated Isocyanurates from the People's Republic of China*. Thus, Petitioners have full knowledge that packaging has been one of the key physical characteristics that has formed the basis of the respondents' cost reporting requirements in these proceedings.
- Petitioners' request to change the Department's reporting requirements for the physical characteristics comes 288 days after the expiration of the applicable deadline and after the factual record has closed. To permit this belated change, would undermine the agency's administrative process and would deprive Shikoku from having meaningful opportunity to submit supplemental factual information to refute Petitioners' argument.
- Petitioners' arguments employ "packing" cost with "packaging" cost interchangeably in conflict with Departmental practice that considers these terms to be distinct.
- Contrary to Petitioners' assertion, the CAFC, in *Washington Red Raspberry*, upheld the inclusion of packaging materials, such as pails and drums containing chlorinated isos, in COM because packaging materials are an integral part of the merchandise.<sup>116</sup>
- Shikoku's reporting of the physical characteristics that comprise the CONNUM is consistent with the Department's treatment of packaging costs in *Chlorinated Isocyanurates from Spain LTFV Final* and *Chlorinated Isocyanurates from the PRC LTFV Final*.<sup>117</sup> In both cases, the Department determined that "packaging" was a physical characteristic that would have a significant impact on production process/costs and therefore included as a component of respondents' direct material costs.
- Similarly, in *Frozen Warmwater Shrimp from Vietnam*, *Certain Preserved Mushrooms from Indonesia* and *Porcelain-on-Steel Cooking Ware from Taiwan*, the Department reiterated the distinction between "packaging" materials and "packing" materials and recognized that "packaging" materials are inescapably purchased as part of the good by the consumer and therefore are properly considered raw materials.<sup>118</sup>
- At Shikoku's cost verification, the Department examined the elements that formed the basis for Shikoku's reported physical characteristics, such as product packaging and

<sup>114</sup> See *Initiation Notice*, 78 FR at 58998.

<sup>115</sup> *Id.*

<sup>116</sup> See *Washington Red Raspberry*, 859 F. 2d at 905.

<sup>117</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005) ("*Chlorinated Isocyanurates from the PRC LTFV Final*") and accompanying Issues and Decision Memorandum at Comment 10; *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from Spain*, 70 FR 24506 (May 10, 2005) ("*Chlorinated Isocyanurates from Spain LTFV Final*"), and accompanying Issues and Decision Memorandum at Comment 6.

<sup>118</sup> See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 56211 (September 12, 2013) ("*Frozen Warmwater Shrimp from Vietnam*") and accompanying Issues and Decision Memorandum at Comment 14; *Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review*, 66 FR 36754 (July 13, 2001) ("*Certain Preserved Mushrooms from Indonesia*"), and accompanying Issues and Decision Memorandum at Comment 16; *Porcelain-on-Steel Cooking Ware from Taiwan: Final Determination of Sales at Less Than Fair Value*, 51 FR 36425, 36425 (October 10, 1986) ("*Porcelain-on-Steel Cooking Ware from Taiwan*").

production/accounting records, and it did not note any inconsistencies with the Department's standard reporting requirements.

**Department's Position:** The Department disagrees with Petitioners that packaging should be excluded as a physical characteristic in the CONNUM for the final determination of this investigation. In market economy ("ME") cases, in calculating AD margins, pursuant to section 773(a)(1)(B) of the Act, the Department examines each product's physical characteristics and determines whether to conduct price-to-price or price-to-constructed value comparisons by examining whether similar products have variable costs that differ from one another by less than 20 percent of the total manufacturing cost of the U.S. product. The intent of this practice is to capture the difference in costs attributable to the difference in physical characteristics among merchandise for a fair comparison.

Early in any AD investigation, the Department sets aside a specific period of time for interested parties to submit comments on this specific issue.<sup>119</sup> The Department requests comments from interested parties at the outset of any investigation on the physical characteristics of the CONNUM because "while there may be some physical characteristics utilized by manufacturers to produce" the subject product, "it may be that only a select product characteristics take into account commercially meaningful physical characteristics."<sup>120</sup> Because the Department may limit its review to a select number of product characteristics, and because the Department uses these physical characteristics in the CONNUM to "base product-comparison criteria on meaningful commercial differences among the products," the Department establishes comment deadlines on this issue early in each investigation.<sup>121</sup> The purpose for establishing these deadlines early in each investigation is to allow the Department to: 1) consider any comments received from interested parties, 2) issue the AD questionnaire to respondents based on these comments, 3) analyze the respondents' data and issue supplemental questionnaires based on the CONNUM-hierarchy established by these comments, and 4) issue AD margins that are fair and accurate within the Department's statutorily mandated deadlines.

In addition to the full opportunity for comment provided by the Department in the instant investigation, the Department also takes notice that Petitioners have participated in all previous segments involving chlorinated isos from the People's Republic of China ("PRC") and Spain since the original less-than-fair value investigations.<sup>122</sup> Accordingly, the Department finds that Petitioners were long aware of the Department's same list of the physical characteristics of the CONNUM for chlorinated isos, established in each of the prior cases.<sup>123</sup> Moreover, the Department finds that Petitioners received notice of the Department's process to provide a

<sup>119</sup> See *Initiation Notice*, 78 FR at 58998.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See the excerpt of the physical characteristics and CONNUMs used in the most recently completed administrative review on chlorinated isos from Spain in the Shikoku's February 18, 2014 submission at Attachment 4; see also Petitioners' participation in that review in *Chlorinated Isocyanurates from Spain: Preliminary Results of the Antidumping Duty Administrative Review; 2011-12*, 78 FR 41367 (July 10, 2013), unchanged in *Chlorinated Isocyanurates from Spain: Final Results of the Antidumping Duty Administrative Review; 2011-12*, 78 FR 72633 (December 3, 2013).

<sup>123</sup> *Id.*



timeframe for parties to submit for comments related to the physical characteristics of the CONNUM. In the Department's *Initiation Notice* for this investigation, the Department specifically invited parties to comment on the physical characteristics of chlorinated isos products that they believed to be relevant in determining accurate product comparisons for this investigation.<sup>124</sup> The deadline to submit comments was October 8, 2013. Neither Petitioners nor Respondents submitted any comments. Accordingly, the Department relied on the physical characteristics for the CONNUM-hierarchy established in the prior investigations and administrative reviews of chlorinated isos from the PRC and Spain in issuing the AD questionnaire to Respondents in this investigation.<sup>125,126, 127</sup>

Since then, and subsequent to several rounds of questionnaire responses from Respondents in this investigation, Petitioners never raised any issue or objection to the physical characteristics of the CONNUM used by the Department until the filing of their case brief. Moreover, Petitioners did not address this issue in any of their multiple submissions on the deficiencies in each mandatory respondent's questionnaire responses until the filing of their case brief.<sup>128</sup> Because Petitioners did not raise this argument until the filing of their case brief, the Department finds that Petitioners' argument regarding whether packaging should be included as a physical characteristic of the CONNUM for chlorinated isos is untimely.<sup>129</sup> Petitioners' argument is over nine months late. Additionally, raising this argument at such a late stage in this proceeding prevents the Department from having an opportunity to consider the comments and evidence on the record regarding the CONNUM-hierarchy. More importantly, by raising such a late argument on a central component of the Department's analysis, the Department is prevented, if such a change would be necessary, from requesting revised data from Respondents based on a revised CONNUM-hierarchy.

In any case, the Department disagrees with Petitioners that packaging should not be included as a physical characteristic of the CONNUM for the final determination of this investigation. In their case brief, Petitioners interchangeably use the terms "packing" and "packaging" when, in fact,

<sup>124</sup> See *Initiation Notice*, 78 FR at 58998.

<sup>125</sup> See Letter to Shikoku Chemicals Corporation, from Scot T. Fullerton, Program Manager, Office V, AD/CVD Operations, Subject: Antidumping Duty Investigation on Chlorinated Isocyanurates from Japan: Questionnaire, (November 27, 2013) at D-1 ("Shikoku's Questionnaire").

<sup>126</sup> See *Chlorinated Isocyanurates from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 10; *Chlorinated Isocyanurates from Spain LTFV*, and accompanying Issues and Decision Memorandum at Comment 6.

<sup>127</sup> See *Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 78 FR 72633 (December 3, 2013) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>128</sup> See Petitioners' February 7, 2014 deficiency comments.

<sup>129</sup> See *Honey From Argentina: Final Results of Antidumping Duty Administrative Review*, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 15 (declining to address arguments for changing the model-matching methodology raised for the first time in the case brief); *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 FR 7237 (February 11, 2005), and accompanying Issues and Decision Memorandum at Comment 10 (stating that arguments on the model-matching methodology should be presented early in the case); and *Structural Steel Beams from Korea: Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 6837 (February 9, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (noting that parties were invited to comment early in the third administrative review on model-matching changes which initially had been raised too late in the second administrative review).

these terms are not synonymous.<sup>130</sup> The Department notes that packing costs are differentiated from packaging costs in the Department's treatment of these two different cost components. Packing costs refer to materials that are used only for the shipment of the merchandise and are a separate component of the COP. By contrast, packaging costs refer to materials that become an integral part of the merchandise that is sold and is included in the cost of manufacture of the product.

As discussed below in Comment 6, Shikoku reported it prepares chlorinated isos for sale to its customers by placing chlorinated isos in plastic bags, tubes or sachets, and then in small boxes, which are packed in cartons for shipment to the customer. However, Shikoku also packages chlorinated isos in sealed pails, drums or supersacks. Packaging in this case (*i.e.*, plastic bags, tubes, sachets, small boxes, pails, drums, supersacks, *etc.*) forms a part of the finished, chlorinated isos product that the customer ultimately purchases as it encases the chlorinated isos to protect it from accumulating moisture and contamination, which can render the product unusable.<sup>131</sup> The Department notes that it verified the physical characteristics of the chlorinated isos products sold by Shikoku and that the chlorinated isos products were purchased by the customers with the packaging.<sup>132</sup> Thus, the Department finds that packaging is a commercially significant physical characteristic of chlorinated isos. Accordingly, as explained above, the Department treated Shikoku's packaging cost as a part of Shikoku's cost of manufacturing because packaging is an integral part of the merchandise for chlorinated isos.<sup>133</sup>

The Department disagrees with Petitioners' reliance on *Washington Red Raspberry* that packaging should only be included as a physical characteristic and included as a cost of material for the CONNUM, pursuant to section 773(a)(6) of the Act, under the narrow exception that the product could "not exist in {its} natural form" without the packaging material.<sup>134</sup> In *Washington Red Raspberry*, the CAFC found that it could not hold, contrary to the Department's arguments, that "any time product is held in a container, the cost of that container must be characterized either as a packing cost or as an expense incidental to placing that product into commerce... Rather, when a product cannot exist in its natural form but-for the container, that container's cost may be included under {section 773(a)(6) of the Act}."<sup>135</sup> The Department finds that, while *Washington Red Raspberry* establishes that packaging should be a physical characteristic and thus included in the cost of materials when the product cannot exist but for the packaging materials, this does not establish that packaging that otherwise transforms the physical properties

<sup>130</sup> See Petitioner's Case Brief at 5-6 (where Petitioners discuss *Washington Red Raspberry* where the CAFC found that packing costs could be treated as a cost of material and then state that packaging does not change the physical characteristic of the chlorinated isos), 9 (where Petitioners discuss packaging does not change the physical characteristics in Issue IIB(3) but also states "there is no record basis to grant the request to treat packing costs as a direct cost of manufacturing"), and 11 (where Petitioners request that the Department "exclude the packing costs *i.e.*, the variable "Packaging").

<sup>131</sup> See Shikoku Cost Verification Report at 19.

<sup>132</sup> See Shikoku's Home Market Verification Report at 14 and VE M-8.

<sup>133</sup> See Shikoku's 2<sup>nd</sup> D QR at 5-6.

<sup>134</sup> See *Washington Red Raspberry*, 859 F. 2d at 905.

<sup>135</sup> *Id.*

of a product cannot be considered an integral part of the product.<sup>136</sup> Specifically, in *Fresh Atlantic Salmon from Chile*, the Department found that packaging, or vacuum-packing, was an integral part of the product because vacuum-packing significantly lowered the bacteria count of the salmon.<sup>137</sup> Similarly, in this case, we find that packaging is an integral part of chlorinated isos because the packaging prevents the chlorinated isos product from accumulating moisture and contamination.<sup>138</sup>

The Department notes that, in contrast to the cases cited by Petitioners that involved packing costs, the Department has a practice of including packaging as a physical characteristic and a cost component of the CONNUM when packaging is considered an integral part of the subject product.<sup>139</sup> The Department finds that, in both the prior investigations of chlorinated isos from the PRC and Spain, the Department found that packaging is an integral part of the subject product and would have a significant impact on production prices and costs.<sup>140</sup> Specifically, in the *Chlorinated Isocyanurates from the PRC LTFV Final*, the Department found that “packaging materials... are inescapably purchased as part of the subject merchandise by the ultimate consumer.”<sup>141</sup> Furthermore, in *Certain Preserved Mushrooms from the PRC*, the Department treated packaging, such as jars or containers, as an integral part of the subject product, which is noted in the scope of this case.<sup>142</sup> Similarly, in *Shrimp from Brazil LTFV Final*, the Department found that packaging, such as the container weight, should be included in the physical characteristic hierarchy of the CONNUM because the container weight is an integral part of the final product and impacts the selling price of the final product.<sup>143</sup>

Based on the Department’s practice of treating packaging as a physical characteristic of the CONNUM-hierarchy when packaging is an integral part of the finished product, the Department finds that it will continue to include packaging as a physical characteristic for this investigation. As discussed above, this is in accordance with the Department’s treatment of packaging in the

<sup>136</sup> See *Washington Red Raspberry*, 859 F. 2d at 905; *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411 (June 9, 1998) (“*Fresh Atlantic Salmon from Chile*”), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>137</sup> See *Fresh Atlantic Salmon from Chile*, and accompanying Issues and Decision Memorandum at Comment 2.

<sup>138</sup> See *Shikoku Cost Verification Report* at 19.

<sup>139</sup> See *Cement from France*, 59 FR at 14144 (where the product was primarily sold in bulk to the customers); *Pads for Woodwind Instrument Keys from Italy*, 58 FR at 42296 (where the Department found that packing costs were in the variable cost of manufacture and noted that packing costs are not considered variable costs).

<sup>140</sup> See *Chlorinated Isocyanurates from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 10; *Chlorinated Isocyanurates from Spain LTFV*, and accompanying Issues and Decision Memorandum at Comment 6.

<sup>141</sup> See *Chlorinated Isocyanurates from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 10.

<sup>142</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People’s Republic of China*, 63 FR 72255 (December 31, 1998) (“*Certain Preserved Mushrooms from the PRC*”) and accompanying Issues and Decision Memorandum at Comment 11 (citing to *Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile*, 63 FR 56613 (October 22, 1998)).

<sup>143</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (December 23, 2004) (“*Shrimp from Brazil LTFV*”), and accompanying Issues and Decision Memorandum at Comment 15.

prior investigations of chlorinated isos from the PRC and Spain.<sup>144</sup> Additionally, similar to *Shrimp from Brazil LTFV*, where the respondent failed to provide any record evidence showing that the container weight has no impact on the selling price and thus should not be physical characteristics, Petitioners have not provided any record evidence showing that the packaging of the chlorinated isos has no impact on the selling price of the finish product.<sup>145</sup> Thus, the Department finds that it has no basis not to include packaging as a physical characteristic of the CONNUM-hierarchy for the final determination. However, the Department will consider Petitioners' argument on the inclusion of packaging as a physical characteristic of the Department's CONNUM-hierarchy if raised at an early stage of the next proceeding, which would allow all parties to not only comment on the proposed change in the model-matching, but also to submit evidence in the ongoing proceedings of chlorinated isos from Japan, the PRC, and Spain.<sup>146</sup>

**Comment 6: Inclusion of Packaging Costs in Shikoku's Variable Cost of Manufacturing**

*Petitioners' Comments*

- In Shikoku's submissions, Shikoku included packaging materials and labor cost as a part of Shikoku's VCOM.<sup>147</sup>
- At verification, Shikoku told the Department that because secondary products use primary products as their material input, Shikoku reported the material costs for the secondary products as the full VCOM of the primary product.<sup>148</sup>
- Per the Department's practice in *Pads for Woodwind Instrument Keys from Italy*, packing costs are not included in the VCOM for purposes of calculating DIFMER adjustments or identifying similar HM sales.<sup>149</sup>
- Pursuant to section 733(a)(1) of the Act, the difference in packing costs are accounted for in the adjustment to the U.S. price, *i.e.*, export value, of the final, subject merchandise. In contrast, the DIFMER adjustment is limited to direct, variable costs associated with physical differences in the subject merchandise, not differences in packaging, pursuant to 19 CFR 351.411(b).
- Packing is explicitly accounted for in sections 772(c)(1)(A) and 773(a)(6)(A) of the Act and therefore the relevant costs do not include packing unless the packing constitutes an essential physical characteristic.
- There is no evidence that retail boxes/consumer packaging, which Shikoku treated as a cost for secondary products, is an integral physical characteristic of the merchandise.<sup>150</sup>

<sup>144</sup> See *Chlorinated Isocyanurates from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 10; *Chlorinated Isocyanurates from Spain LTFV*, and accompanying Issues and Decision Memorandum at Comment 6.

<sup>145</sup> See *Shrimp Brazil LTFV*, and accompanying Issues and Decision Memorandum at Comment 15.

<sup>146</sup> See *Shrimp from Thailand*, and accompanying Issues and Decision Memorandum at Comment 3.

<sup>147</sup> See Shikoku's Second Supplemental Section D Questionnaire Response, (May 7, 2014) at 5 ("Shikoku's 2<sup>nd</sup> SDQR").

<sup>148</sup> See Shikoku Cost Verification Report at 19.

<sup>149</sup> See *Final Determination of Sales at Less Than Fair Value: Pads for Woodwind Instrument Keys from Italy*, 58 FR 42295, 42296 (August 9, 1993) ("*Pads for Woodwind Instrument Keys from Italy*").

<sup>150</sup> See *Cement from France*, 59 FR at 14143.

Accordingly, the cost for retail boxes/consumer packaging should be excluded from Shikoku's VCOM.

- Packaging costs should not be included in Shikoku's VCOM for purposes of the DIFMER test for the final determination and therefore the DIFMER test should be re-calculated run based on VCOM costs that do not include packaging.

#### *Shikoku's Comments*

- It is Departmental practice to capture respondents' packaging cost as a component of the respondents' COM.
- The Department requires respondents to report in VCOM all variable costs associated with the physical characteristics of the subject products.
- Case precedent supports the Department's requirement that Shikoku report all costs associated with packaging as a component of VCOM.<sup>151</sup>
- Petitioners' arguments employ "packing" cost with "packaging" cost interchangeably in conflict with the Department's AD Manual that considers these terms to be distinct.
- Petitioners are incorrect that Shikoku reported "packing" as a component of COM. In its Section D questionnaire responses, Shikoku specifically notified the Department that it excluded packing expenses from its COM but included materials, labor, and other conversion costs associated with packaging in its reported VCOMs.<sup>152</sup>
- Petitioners' case precedent is irrelevant to the appropriate treatment of packaging costs because these cases involve packing expenses and are not applicable to the treatment of packaging costs.
- The record evidence shows that Shikoku tracks product-specific costs and its cost records allow Shikoku to identify the material/conversion costs specific to each package form by product. The differences in packaging types and associated packaging conversion costs differ significantly by the reported VCOMs for the different CONNUMs for dichlor and trichlor products.
- If the Department removed packaging as a physical characteristic for the CONNUM, the Department would be aggregating varying different material inputs and costs into a single CONNUM, which would result in the matching of fundamentally dissimilar products.
- Petitioners' proposed adjustment ignores the fact that packaging is a critical component of Shikoku's total COP for chlorinated isos and that the fundamental objective of the Department's AD analysis is to render fair, reasonable U.S. price-to-NV comparisons.<sup>153</sup>
- Removing packaging from the physical characteristic analysis and eliminating all packaging material costs from Shikoku's reported VCOMs yields distortive product comparisons. In other words, the cost of producing one metric ton of chlorinated isos would be considered identical to one kilogram ("kg") box containing individual sachets

<sup>151</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Malaysia, 69 FR 34128 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 5; *Ad Hoc Shrimp Trade Action Committee v. United States*, Slip Op. 2009-126 (CIT 2009).

<sup>152</sup> See Shikoku's Section D Questionnaire Response, (March 21, 2014) at D-17 ("Shikoku's 1<sup>st</sup> D QR"); Shikoku's 2<sup>nd</sup> SDQR at 8.

<sup>153</sup> See 19 CFR 351.411(b); *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (CAFC 1990) ("*Rhone Poulenc*").



of chlorinated isos, which would not include the additional materials, labor, and processing required to package each sachet in the one kg box.

**Department's Position:** The Department agrees with Shikoku that packaging costs should be included in Shikoku's reported VCOMs for calculating Shikoku's DIFMER adjustments or identifying similar HM sales in the final determination. As discussed above in Comment 5, the Department distinguishes packing costs from packaging costs.<sup>154</sup> Petitioners cite to sections 771(16), 772(c)(1)(A), and 773(a)(6)(A), of the Act, and to a number of cases<sup>155</sup> arguing that packing costs should not be included in the VCOM for purposes of calculating DIFMER and identifying similar merchandise, because differences in packing costs are accounted for by the adjustment to export value according to section 773(a)(1) of the Act. While the Department agrees with Petitioners that packing costs should not be included in the VCOM, the Department notes that Petitioners' argument and the cases cited by Petitioners are not on point because they discuss packing costs, while the costs at issue are packaging costs, which the Department considers part of the COM.

In this investigation, the Department notes that, as discussed above in Comment 5, packaging in this case (*i.e.*, plastic bags, tubes, sachets, small boxes, pails, drums, supersacks, *etc.*) forms a part of the finished, chlorinated isos product that the customer ultimately purchases as it encases the chlorinated isos to protect it from accumulating moisture and contamination, which can render the product unusable. Accordingly, packaging is an integral part of the final product and is appropriately included in VCOM. Cartons for shipment to the customer, however, are an example of packing costs and are included as a component of COP, which is separate from VCOM.

Moreover, the Department disagrees with Petitioners' assertions that "not until one week before verification" did Shikoku explain that packaging materials and labor were previously included as variable costs, and that Shikoku "essentially disguised the fact that it had included packing costs in the VCOM until its May 7, 2014 response,"<sup>156</sup> allegedly impeding Petitioners' ability to raise this issue early in the proceeding. The Department finds that it was clear from Shikoku's initial Section D questionnaire response that the company excluded packing costs from the cost of materials and included packaging costs in COM.<sup>157</sup> In its response to the first supplemental section D questionnaire, Shikoku further explained how it identified "packaging expenses included in the cost of manufacturing."<sup>158</sup> The Department also concludes that Petitioners in their pre-preliminary and pre-verification comments discussed Shikoku's calculation of

<sup>154</sup> See *Chlorinated Isocyanurates from the PRC LTFV*, and accompanying Issues and Decision Memorandum at Comment 10; *Chlorinated Isocyanurates from Spain LTFV*, and accompanying Issues and Decision Memorandum at Comment 6.

<sup>155</sup> See Petitioners' Case Brief at page 3 citing to *Pads for Woodwind Instrument Keys from Italy, Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Austria*, 60 FR 33551, 33556 (June 28, 1995), and *Cement from France*.

<sup>156</sup> See Petitioners' Case Brief at 3 and 8.

<sup>157</sup> See Shikoku's 1<sup>st</sup> D QR at 16, 17 and 26 and exhibit D-11.

<sup>158</sup> See Shikoku's 1<sup>st</sup> SDQR at 5.

packaging costs as part of the COM, thus acknowledging that Shikoku included packaging cost in the COM.<sup>159</sup>

Additionally, with respect to Petitioners' argument that retail boxes/consumer packaging should not be included in the VCOM, the Department notes that Shikoku explained that chlorinated isos may be packaged in small plastic individual sachets that are placed in a small box. These small boxes are then packed into a larger carton for shipment to the customer. As the individual small box is the product from which the chlorinated isos is destined for final sale to the customer, the Department finds that Shikoku properly reported the plastic sachets and small boxes as packaging and included this packaging cost in VCOM.<sup>160</sup>

Petitioners argue that such small boxes should not be treated as packaging, because in *Cement from France*, the Department stated that "consumer packaging" is not "an integral physical part of the merchandise under investigation." The Department finds that Petitioners' reliance on *Cement from France* is misplaced because the citation was taken out of context. In *Cement from France*, at issue was whether flux placed in special bags for certain customers was packaging.<sup>161</sup> The Department noted that bagged flux was not sold from inventory, was bagged only at the request of certain customers, and was sold in bulk to the majority of customers. On the basis of this evidence, the Department determined that the bags were not packaging as they did not constitute an integral part of the final product.<sup>162</sup> In contrast to the facts from *Cement from France*, the Department finds that the product subject in this case, chlorinated isos, is not typically sold in bulk, and the boxed sachets of chlorinated isos are inventoried and sold from inventory in such packaged form.

Accordingly, as noted above, the Department has determined in this case that the small boxes in which Shikoku packages individual sachets of chlorinated isos are an integral part of the final product as they are a commercially significant physical element of chlorinated isos and are inescapably purchased as part of the subject merchandise by the ultimate consumer. Therefore, the Department finds that Shikoku's VCOM should include the cost of such small boxes.

<sup>159</sup> See Petitioners' March 27, 2014 Pre-Preliminary Comments at 3 and 4; and Petitioners' May 15, 2014 Comments Concerning Verification of Shikoku at 3.


<sup>160</sup> See Shikoku's 2<sup>nd</sup> SDQR at 4 and 5.

<sup>161</sup> See *Cement from France*, 59 FR at 14143-4.

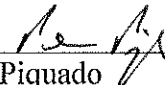
<sup>162</sup> *Id.*

## Conclusion

We recommend applying the above methodology for this final determination.

  
\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

  
\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

8 SEPTEMBER 2014  
(Date)